

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MARK S. BARBER and
KARRI BARBER,

Plaintiffs,

vs.

Case No. 2005-1343-NI

MARK W. BURNS, GOLEN TRAFFIC
SERVICES, INC., a Michigan Corporation,
KINNIE-ANNEX CARTAGE CO., a
Michigan Corporation, and B. T. LEASING,
INC., a Michigan Corporation,

Defendants.

OPINION AND ORDER

Plaintiffs move to compel defendant B. T. Leasing, Inc.'s and Golen Traffic Services, Inc.'s answers to plaintiffs' second interrogatories and request production of documents dated February 9, 2006.

I

Plaintiffs filed their complaint on April 4, 2005. Plaintiffs allege that on December 9, 2003, plaintiff Mark S. Barber was a passenger in a vehicle driven northerly on Groesbeck, approaching its intersection with 12 Mile Road. Plaintiffs contend that defendant Mark W. Burns was the operator of a 1996 Ford semi-tractor, owned by defendant B. T. Leasing, Inc., and/or Kinnie-Annex Cartage Co., and was in the course and scope of his employment when he rear-ended the vehicle in which plaintiff was traveling. Plaintiffs assert plaintiff Mark S. Barber sustained serious injury; his wife sues for loss of consortium. Plaintiffs now move to compel



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production and answers to interrogatories served on defendant B. T. Leasing, Inc., and Golen Traffic Services, Inc.

II

Plaintiffs assert that defendant B. T. Leasing, Inc., was served with plaintiffs' second interrogatories and request for production of documents on February 9, 2006, but has failed to answer the interrogatories. Plaintiffs contend that defendant Golen Traffic Services was served with the second request for production of documents on February 9, 2006, but failed to respond within 28 days. Instead, plaintiffs assert, Golen Traffic Services, Inc., filed objections to the second request for production of documents on March 8, 2006. Plaintiffs assert that the discovery request is in two parts. First, plaintiffs contend they submitted straightforward interrogatories and request for production of documents to B. T. Leasing, Inc., requesting information regarding the gross and net weight of the semi-tractor/trailer involved in this collision. Second, plaintiff Golen Traffic Services, Inc., requested complete copies of the driver's log from December 1 to December 8, 2003.

Plaintiffs contend the more troublesome request is for copies of any statements made by defendant Mark Burns. Plaintiffs assert that Burns testified in deposition that he believed a recorded statement had been taken by adjuster Timothy Brady and possibly someone from the insurance companies, and the individual from Golen Traffic. Plaintiffs allege defense counsel is in possession of such documents but refuses to turn them over. Plaintiffs assert the statements are sought for impeachment purposes. Plaintiffs contend that they are forced to partly rely upon the testimony of Burns, and therefore his credibility and possible admissions are crucial.

In response, defendants assert that Burns did speak with an insurance representative in anticipation of litigation, and the interview was ultimately transcribed. Defendants contend

Burns did not need to consult the transcript to refresh his recollection of the accident at deposition. Defendants contend that the statement is not discoverable for the reasons of the work-product privilege. Defendants note that a party seeking discovery of attorney work product may proceed only upon a showing of substantial need for the materials sought plus inability to obtain the information without undue hardship. Further, defendants aver, the privilege is extended to include work product prepared by the party's insurer. Defendants maintain plaintiffs have had the opportunity to obtain the information sought, as they deposed Burns directly.

III

A trial court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). Whether a document is protected by the work-product doctrine presents a question of law that is reviewed de novo. *Leibel v General Motors Corp*, 250 Mich App 229, 244; 646 NW2d 179 (2002). The premise of the work product doctrine is that "any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation are protected from discovery." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 637; 591 NW2d 393 (1998).

Although the rule protecting work product from discovery is most often used to protect attorneys' litigation files, under the plain language of the rule litigation files prepared by insurers are also protected. *Koster v June's Trucking, Inc*, 244 Mich App 162, 171; 625 NW2d 82 (2000). MCR 2.302(B)(3)(a) applies to litigation files of a party's "representative (including an insurer. . .)." Under the clear language of MCR 2.302(B)(3)(a), documents and tangible things prepared in anticipation of litigation by or for an insurer of a party are not discoverable absent a showing that the party seeking discovery has a substantial need for the materials and is unable

without undue hardship to obtain the substantial equivalent of the materials by other means.

Koster, 171.

Michigan courts have ruled that the requirement for showing substantial need and undue hardship is satisfied where the moving party establishes that the work product cannot be otherwise obtained and that the work product would be useful to the moving party. *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 655, n 4; 385 NW2d 296 (1986). "Useful" documents include those "which would be used for purposes of impeachment or corroboration." *Great Lakes*, 655, n 4.

The last sentence of MCR 2.302(B)(3)(a) provides: "In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." That is, as noted, "to obtain pretrial discovery of an opposing party's work product, the requesting party must demonstrate both substantial need and undue hardship, and even upon that showing the seeker may discover only factual, not deliberative, work product." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 644; 591 NW2d 393 (1998), citing MCR 2.302(B)(3)(a). Accordingly, the trial court must conduct an in camera inspection of the documents to determine whether they are protected from discovery by the work-product doctrine. If they are, the burden is on plaintiffs to show "substantial need" and "undue hardship" and, if plaintiffs do, any order must "protect against disclosure" of the thought processes of defendants' representatives. *Koster, supra*, 172.

First, the Court is persuaded to order defendant B. T. Leasing, Inc., to answer the interrogatories and request to produce relating to the weight of the semi-tractor. Further, Golen Traffic Services, Inc., shall be compelled to produce the driver's log as requested. Second, with

regard to the recorded statements of Mark Burns, the Court notes that both parties appear to agree that this is work product. The Court therefore does not need to conduct an in camera review to determine same. Further, the Court is persuaded that plaintiffs' burden of showing substantial need and undue hardship has been met, as set forth in *Great Lakes, supra*, as plaintiffs assert that his testimony is crucial in this case and that the work product statements could be useful for impeachment purposes. The Court is persuaded plaintiffs are thus entitled to discover the statements. However, defendants are entitled to redact any statements by its representatives and/or Burns which reveals defendants' thought processes relating to this litigation—only factual statements are ordered disclosed.

IV

Based on the foregoing, it is hereby

ORDERED plaintiffs' motion to compel is GRANTED. Specifically, B. T. Leasing, Inc., is directed to answer plaintiffs' second interrogatories and request for production of documents dated February 9, 2006, relating to the weight of the semi-tractor/trailer. Defendant Golen Traffic Services, Inc. is further directed to answer plaintiffs' second request for production of documents dated February 9, 2006, pertaining to the driver's log from December 1 to December 8, 2003, and it is further

ORDERED that both B. T. Leasing, Inc., and Golen Traffic Services, Inc., shall produce statements and/or transcripts of Mark Burns, to the extent that they pertain to factual work product; deliberative work product is privileged and may not be produced.

In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

SO ORDERED.

DATED:

Peter J. Maceroni,
Circuit Judge

cc: Bruce Trogan
Paul Johnson

PETER J. MACERONI
CIRCUIT JUDGE

JUN - 7 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK

BY: *Carmella Sabaugh* Court Clerk